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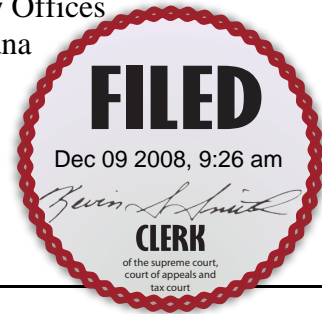
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**IN THE
COURT OF APPEALS OF INDIANA**

JANE (MORROW) HAZLETT,

Appellant-Respondent,

VS.

DARYL MORROW,

Appellee-Petitioner.

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No. 16A05-0806-CV-351

APPEAL FROM THE DECATUR CIRCUIT COURT

The Honorable John A. Westhafer, Judge

Cause No. 16C01-9705-DR-94

December 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, Jane Hazlett (Hazlett), appeals the trial court's Order denying her petition to modify support and determining the support arrearage owed by Appellee-Petitioner, Daryl Morrow (Morrow).

We reverse and remand.

ISSUE

Hazlett presents one issue for our review, which we restate as: Whether the trial court abused its discretion when it refused to modify the previous child support Order.

FACTS AND PROCEDURAL HISTORY

Hazlett and Morrow were divorced on August 26, 1997. They had one child, R.M., who was born on January 21, 1993. The parties agreed to comply with the provisions of an agreement they had entered on August 21, 1997. This agreement provided that the parties had joint custody of R.M. and that each party would pay equally R.M.'s medical expenses not covered by insurance, as well as the costs of his clothing and shoes. In addition, Morrow was solely responsible to provide health insurance for R.M.

R.M. lived with Morrow until the spring of 2006, when he began living with Hazlett. During the time R.M. lived with Morrow, Hazlett made few reimbursements.

On March 9, 2005, Hazlett filed a motion for modification of custody and support. On March 30, 2006, an Order was issued confirming that Hazlett had physical custody of R.M., and the trial court ordered Morrow to pay Hazlett unreimbursed expenses in the amount of \$645.88. On April 7, 2006, the trial court directed the parties to continue with the previous

child support arrangement, in which the non-custodial parent reimbursed the custodial parent for half of certain expenses.

Hazlett filed for Title IV-D child support services because Morrow was not keeping up with his child support obligations. On July 19, 2007, Hazlett, with assistance from the State, filed a petition to modify support alleging changed circumstances necessitated the modification. On December 14, 2007, the trial court conducted a hearing on the motion. At the hearing, the parties stipulated to the fact that, were the Indiana Child Support Guidelines used to calculate Morrow's child support obligation, Morrow would owe one hundred dollars per week in child support.

On December 19, 2007, the trial court issued its Order denying the petition to modify support, but finding that Morrow was in arrears by the sum of \$2,164.00. The trial court ordered Morrow to pay his support arrearage within ninety days and ordered Hazlett to deliver all future claims for reimbursement to Morrow's attorney.

The State intervened and filed a motion to correct error on January 18, 2007. On February 1, 2008, the trial court set the motion for a hearing, which was held on May 2, 2008.¹ The trial court denied the motion to correct error on May 8, 2008.

Hazlett now appeals. Additional facts will be provided as necessary.

¹ A transcript of the hearing on the motion to correct error was not provided with the record for this appeal.

DISCUSSION AND DECISION

Hazlett argues that the trial court abused its discretion when it refused to modify the support obligation of Morrow. Specifically, Hazlett contends that since the amount which Morrow has been found to owe under the current arrangement deviates by more than twenty percent from what he would owe if the child support guidelines were applied, Morrow's obligation should be modified.

An order for child support is intended to provide for the support and maintenance of the parties' minor children. *Beehler v. Beehler*, 693 N.E.2d 638, 640 (Ind. Ct. App. 1998). "When custody, support, or visitation issues are being determined, the best interests of the child are the primary consideration." *Beaman v. Beaman*, 844 N.E.2d 525, 532 (Ind. Ct. App. 2006).

Indiana Code section 31-16-8-1 provides that a child support order may be modified only:

(1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or

(2) upon a showing that:

(A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and

(B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

Morrow points out that Hazlett's petition to modify support was based solely on Indiana Code subsection 31-16-8-1(1). However, before the trial court Hazlett failed to make

a showing of changed circumstances, and she makes no argument on appeal that changed circumstances entitle her to a modification of the support agreement. Rather, on appeal, she contends that she is entitled to a modification because the current agreement results in a difference from the Child Support Guidelines of more than twenty percent. But, Hazlett did not allege this in her petition to modify support or make any such contention to the trial court at any time. Normally we would conclude that Hazlett has waived this contention for review. *See Hay v. Hay*, 730 N.E.2d 787, 794 (Ind. Ct. App. 2000). However, the trial court was presented with a stipulation as to the amount Morrow would owe if the Child Support Guidelines were imposed. And Hazlett presented evidence proving the amount of Morrow's arrearage, which Morrow does not challenge. For the sake of judicial economy and to promote the best interests of the child, we will deem this showing sufficient to preserve Hazlett's argument that she was entitled to modification under Indiana Code section 31-16-8-1(2).

As for the merit of Hazlett's claim, Morrow contends that because the amount of child support he would owe will fluctuate from month to month, Hazlett has not proven that the agreement necessarily results in a difference of more than twenty percent from the Child Support Guidelines. However, the parties stipulated that under the Child Support Guidelines Morrow would owe \$5,200.00 per year. According to the trial court's Order, which utilized

the current agreement, Morrow owed \$2,164.00 for a period of about a year.² Morrow does not contend that he actually owes more than \$2,164.00. We conclude that the logic and effect of these facts and circumstances is that the current arrangement results in a deviation of more than twenty percent from the Child Support Guidelines.

That being said, if the trial court determines that the imposition of the Child Support Guidelines would be unjust it may deviate from those guidelines, but the trial court must make findings of fact articulating the reason for this conclusion. *See* Ind. Child Support Rule 3. Therefore, we remand for the trial court to make appropriate findings, if necessary, and to adjust the child support order accordingly.

Since we are remanding, we feel that it is necessary to address a comment by the trial court during the hearing. The trial court noted that the reason Morrow's current child support obligation would deviate from the Child Support Guidelines is due to the agreement that Hazlett entered into voluntarily with the aid of counsel. However, this does not have bearing upon a consideration of whether modification is appropriate because we have held that "despite an agreement between the parents regarding child support, the child support order may be subsequently modified." *Adams v. Adams*, 873 N.E.2d 1094, 1098 (Ind. Ct. App. 2007) (quoting *In re Marriage of Kraft*, 868 N.E.2d 1181, 1188 (Ind. Ct. App. 2007)). Moreover, forcing parents to be bound by a bad child support agreement simply because they

² It is difficult to determine from the Transcript what time periods are actually covered by the trial court's finding that Morrow was in arrears in the amount \$2,164.00. The trial found the amount of the arrearage, but not any corresponding dates related to that arrearage. This is likely due to the inability of the parties to present coherent evidence at the hearing. It is apparent from the record that Hazlett had made some calculations and that there was a pile of receipts, but none of the receipts were entered as evidence. It also is apparent that even the State, which was advocating on Hazlett's behalf, expressed that Hazlett had improperly calculated at least the amount owed for 2006. However, we can decipher from the Transcript that the

entered the agreement voluntarily would frustrate our primary focus, which is to ensure that the best interests of the child are met.

Additionally, Morrow complained to the trial court that he did not receive much in child support from Hazlett while he was the custodial parent of R.M. However, Morrow had his opportunity to seek enforcement of the agreement, and, or, seek a modification of the agreement if the requirements of Indiana Code section 31-16-8-1 were met. Morrow chose not to do so, and his decision does not infringe upon Hazlett's ability to seek modification.

CONCLUSION

Based on the foregoing, we conclude that the trial court abused its discretion when it denied Hazlett's petition to modify support.

Reversed and remanded.

VAIDIK, J., and BRADFORD, J., concur.